U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: EAC 05 033 50050 Office: VERMONT SERVICE CENTER Date: OCT 11 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a software services company. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a degree equivalent to a United States baccalaureate degree.

The director adjudicated the petition based on an incorrect immigrant visa classification. The director stated that the petitioner "filed a petition to classify the beneficiary under section 203(b)(3)" of the Act, as a skilled worker, professional, or other worker. The petitioner, however, had indicated on Form I-140 that it seeks to classify the beneficiary as a member of the professions with the equivalent of an advanced degree, pursuant to section 203(b)(2) of the Act. On appeal, counsel refers to the matter as "an EB2 Form I-140 visa petition," confirming that the petitioner seeks to classify the beneficiary under section 203(b)(2), not section 203(b)(3), of the Act.

Because the director did not adjudicate the petition based on the requested classification, the director's decision is fatally flawed and cannot stand. The director must issue a new decision based on the proper regulations as they relate to the classification sought.

Beyond the director's decision, review of the record reveals an evidentiary deficiency that further prevents the approval of the petition. If the beneficiary does not possess an actual advanced degree, 8 C.F.R. § 204.5(k)(3)(i)(B) requires the petitioner to submit an official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Even if we assume, for the sake of argument, that the beneficiary holds a foreign degree equivalent to a U.S. baccalaureate, the petitioner must still show that the beneficiary accumulated at least five years of progressive post-baccalaureate experience during the relevant period. This period began on April 12, 1995, which is the date on the beneficiary's "Honours Diploma" from APTECH Institute. (Any earlier experience would not be "post-baccalaureate," as the petitioner has argued that the APTECH diploma is integral to the beneficiary's educational equivalency.)

Pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971), the beneficiary must possess the necessary qualifications for the job as of the petition's filing date. The petition's filing date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the filing date is June 25, 2001. Experience after that date cannot count toward the five years of progressive post-baccalaureate experience *as of the date of filing.*

Therefore, the petitioner must submit letters from current or former employers to show that the beneficiary accumulated at least five years of progressive employment experience between April 12, 1995 and June 25, 2001. To document the beneficiary's employment between those dates, the petitioner has submitted the following letters:

[redacted], director of sales and marketing for APTECH Computer Education, states that the beneficiary "has worked for our organization as Senior Faculty and Programmer from 15th December, 1993 to 30th November, 1995." This letter documents seven and a half months of qualifying "post-baccalaureate" employment experience.

[redacted] director RACOMP Computers Networking and Peripherals, states that the beneficiary "has worked as Sr. Programmer in our company from December 5th, 1995 to April 26th, 1996." This letter accounts for less than five months of qualifying experience, bringing the total so far to just over one year.

The beneficiary claims no employment between April 27, 1996 and August 14, 1996.

[redacted], director of corporate IT for Al-Khansa Concourse Information Technology, LLC, states that the beneficiary "has worked with us as Programmer Analyst in our organization from 15th August 1996 to 31st October 1997." This letter accounts for fourteen and a half months of employment, for a total so far of less than two years and three months.

There then follows another gap of almost three months, from November 1, 1997 to January 22, 1998.

[redacted] centre director of Asset International School for Software Exports Training, states that the beneficiary "has worked for us as System Administrator from 23rd January, 1998 to 13th May, 1998 as a Full time employee." This letter accounts for slightly less than four months of employment experience, bringing the total to about two years and seven months.

[redacted] states "[f]rom May 1998 until September 1998, I was a co-worker of [the beneficiary], who worked for Systems America (I) Ltd." The record contains no evidence that [redacted] was the beneficiary's "employer," or is authorized to attest to the beneficiary's employment on behalf of Systems America (I) Ltd. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) calls for "letters from current or former employer(s)," rather than affidavits from individuals who claim, without proof, to have been co-workers.

On an addendum to Form ETA 750B, the beneficiary claims that he worked for Systems America (I) Ltd. from September 1998 to January 2002. The record contains no evidence of any kind to substantiate this period of claimed employment. The petitioner offers no explanation to account for the absence of primary evidence of the beneficiary's claimed employment at Systems America (I) Ltd.; indeed, the petitioner does not even acknowledge this lack of evidence. Even if we were to ignore the regulations and give Murali Munugeti's affidavit the benefit of the doubt, the total documented qualifying employment would still be less than three years, well short of the mandatory five years.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) states:

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

While some of the materials submitted by the petitioner to document the beneficiary's employment from 1995 to 2001 meet the regulatory standard, there remain substantial gaps in the evidence. Therefore, even if the petitioner had fully overcome the director's stated grounds for denial, the petition would still not be amenable to approval as the record now stands. The director's further actions should take this into account.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.